IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISIDICTION

WRIT PETITION NO.6370 OF 2004

Bharat Sanchar Nigam Limited]
through the Divisional Engineer]
Telecom, 681-690 Beej Bhawan]
Market Yard, Gultekdi,]
Pune-411003]..Petitioners

Versus

1. Ramesh B.Tigadi]
427, Congress Road,]
Belgaum 590006]
]
2. Presiding Officer,]
The Central Govt.]
Industrial Tribunal No.1]
Mumbai]..Respondents

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Mrs.N.V.Masurkar with V.S.Masurkar for Petitioners
Mr.Jayprakash Sawant for Respondent no.1

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CORAM : B.H.MARLAPALLE,J.

DATE : MARCH 3,2005

ORAL JUDGEMENT:

1. The petitioner has challenged the Award dated 12.11.2003 passed by the learned Presiding Officer of the Central Govt. Industrial Tribunal in Reference No.CGIT-04/1994 directing reinstatement of the respondent with continuity in service but 50% backwages.

2. The material facts which are not in dispute and

leading to this petition, could be briefly set out as under:

. One Mr.H.P.Kulkarni, the Assistant Engineer under the Petitioner-enterprise of Govt. of India functioning under the Ministry of Communication and Information Technology, was incharge of the Coaxial Cable Project at Belgaum during the period 1977-1994. His duty was to carry out project related works anywhere in the State of Maharashtra and Goa and parts of Karnataka depending upon the Scheme assigned to him and this work included the trenching, digging, installation of equipments etc. For the same work, he used to engage manual labour on casual/daily wage basis. One Mr.A.B.Halijwale was a junior telecom officer under Mr.Kulkarni at Ichalkaranji and the present respondent happens to be the brother-in-law of Mr.Halijwale. The respondent approached Mr.Kulkarni with Mr.Halijwale and requested for work more so because he had a short break in his studies and though not registered with the employment exchange in Maharashtra, was interested in working as a daily wager on the project work. The respondent was therefore, engaged as a casual Mazdoor on monthly payment of Rs.300/- from 1st March, 1984 and he worked till 31.3.1985, and the number of total working days came to 371. The Coaxial Cable Project was over by 31st March, 1985.

. The respondent submitted for first time a representation dated 24.9.1990 to the Assistant Labour Commissioner (Central) at Pune and thereafter, submitted a second representation dated 27.7.1991 claiming that he was illegally terminated from service and he was entitled for re-employment/reinstatement. When the Assistant Labour Commissioner took up the representation of the petitioner, it was informed that the respondent did not turn up on completion of the project on 31.3.1985 and did not approach at any time for about five years complaining about the illegal termination of his service by the petitioner or any of its officers. It was further stated that there was no recruitment of casual Mazdoors and the Assistant Engineer/Divisional Engineer did not have powers to reinstate such Mazdoors. On account of failure to settle the dispute, the Assistant Labour Commissioner submitted his failure report on 11.8.1992 to the Secretary under the Ministry of Labour Govt. of India which resulted in making reference for adjudication of the demands put up by the respondent to the Central Govt. Industrial Tribunal at Mumbai in Reference CGIT No.4/1994.

3. The respondent submitted his statement of claim and contended that during the period from 1.3.1984 to

31.3.1985 he had worked for more than 240 days and therefore,the oral termination of his service with effect from 1.4.1985 amounted to retrenchment within the meaning of Section 2(oo) and without compliance of the mandatory conditions set out under Section 25F of the Industrial Disputes Act, 1947 (for short, the ID Act.). Adding to this substantial ground, he also contended that three new persons viz. (1) Umesh Kiwade with effect from 1.1.1987, (2) Dilip Pulambrikar with effect from 1.1.1988 and (3) Bahusaheb Salunke with effect from 13.2.1988 were appointed without considering his claim for reemployment though these persons were claimed to be junior to him. On this ground he alleged violation of the mandatory requirements of Section 25H of the ID Act. The petitioner filed its written statement and opposed the reference by denying the allegations of termination of service and consequently retrenchment within the meaning of the ID Act. It was pointed out that on completion of the Coaxial Cable Project at Ichalkaranji on 31.3.1985 the respondent left Ichalkaranji and went to his native place in Karnataka State to pursue his studies. The department had never terminated his service and therefore, there was no question of retrenchment, leave alone illegal retrenchment of service. It also claimed that for a long period of five years the respondent never approached any officer of the

petitioner-enterprise with a request for reemployment or on the claim that he was illegally removed from service and therefore was required to be reinstated or absorbed like the other persons who were alleged to have been reemployed. In short, the petitioner contended that the claim made, was hit by limitation and could not be entertained by the Industrial Tribunal. The reference was prayed to be dismissed.

4. By an award dated 6.6.1996, the reference was rejected by the Industrial Tribunal by following the law laid down by the Supreme court in the case of *Sub-Divisional Inspector of Post, Yaikam & Ors. etc. Vs. Thayyan Joseph etc.* The respondent challenged the said award in W.P.No. 4867 of 2000 before this Court and the petition came to be disposed off by an order dated 22.12.2000, in view of the subsequent decision of the Supreme Court in the case of *General Manager Telecom Rao reported in 1997 (8) SCC 767,* by setting aside the impugned award and restoring the reference for being decided on merits. On remand, the respondent-employee submitted his affidavit by way of evidence and on the same, he was cross examined. Similarly, the petitioner submitted the affidavit of Mr.Nilesh Kumar Verma Divisional Engineer and he was cross-examined on the same by the respondent-employee. In the meanwhile, the subsequent decision of the Supreme Court in the case

of *S.M.Nilajkar and others Vs. Telecom District Manager, Karnataka; (2003) 4 Supreme Court Case 27,* was also placed before the Tribunal. The Tribunal considered the arguments advanced by the respective parties as well as the evidence and by relying upon the decision in the case of *S.M.Nilajkar (Supra)*, it held in the impugned award that the present petitioner was guilty of resorting to illegal retrenchment which implied that the respondent was removed from service by way of retrenchment and without compliance of the mandatory requirements of Section 25F of the ID Act.

5. Mrs.Masurkar, the learned counsel for the petitioner reiterated that at the first place, there was no termination of service of the respondent-employee and attributable to any officer of the petitioner and therefore, there was no retrenchment of service within the meaning of Section 2(oo) of the ID Act. The decision in the case of S.M.Nilajkar and others (supra), was not properly appreciated by the Industrial Tribunal and infact, by following the decision, it ought to have been held that there was no case of retrenchment firstly on the ground that there was no termination of service and secondly the respondent was employed in a project which was completed on 31.3.1985. By referring to the evidence placed on record, the learned counsel

for the petitioner urged that the Tribunal failed to consider the same and it fell in gross errors in upholding the contentions of the respondent-employee that he was illegally retrenched from service. She also pointed out that the respondent did not have any appointment letter in his favour and he was continued as a casual Mazdoor at the instance of his brother in law who was employed under the petitioner.

6. While supporting the impugned award, Mr.Sawant, the learned counsel for the respondent-employee submitted that the findings of the Tribunal on the issue of illegal retrenchment are well reasoned and the employer had failed to make out a case of exception as contemplated in clause (bb) of Section 2(oo) of the ID Act. The onus of proving that the respondent-employee was engaged for a specific period and for a specific project till its completion was on the employer and the same could not be discharged. Once it was accepted that the respondent had put in 371 days of service in a continuous period of 13 months from 1.3.1984 till 31.3.1985, the Tribunal was bound to record a finding that the respondent had worked for a period of continuous one year before the date of termination within the meaning of Section 25B of the ID Act. The learned counsel placed reliance on the decision in the case of S.M.Nilajkar and others (supra), as well as on the decisions in the

following cases:

1) *S.G.Chemical and Dyes Trading Employee's Union Vs. S.G.Chemicals and Dyes Trading Ltd.and another reported in 1986 LAB I.C. 863*.

2) *Central Bank of India Vs. S.Satyam and ors. reported in 1996 II CLR 1095.*

7. The case of the respondent-employee before the Tribunal and as referred to hereinabove was that he was illegally terminated from service and the said termination amounted to retrenchment within the meaning of Section 2(oo) of the ID Act and as the said action was without following the mandatory conditions set out under Section 25F of the said Act, he was entitled for reinstatement with continuity of service and backwages. The department in its written statement clearly took a plea that there was no termination of the respondent-employee's service at the instance of any of its officers and on completion of the project on 31.3.1985 he himself left Ichalkaranji and went to his native place. In para no.3 of the written statement the petitioner had stated thus:

. "In fact, the nature of work for which the said workman was working was a

> temporary one and there was no compulsion on any of the casual labourers to attend duties and it was a matter of their choice to attend or not and the said workman in fact had remained absent himself after 31.3.1985 and, therefore, there was no question of denying any livelihood to him, nor did the question arise of any retrenchment, as is sought to be contended by the Party No.2 i.e. the workman by filing the statement of claim in this Honourable Tribunal. As there is no question of termination either orally or writing, the question of arbitrariness does not arise at all.....
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> . since he was not a regular workman, there was no question of giving any notice and calling him to remain present on work."

8. On the face of a specific plea taken by the employer, it was necessary for the Tribunal to frame the first issue as to whether there was a termination of service at the instance of the employer before it proceeded to examine the issue of retrenchment and consequent was question of compliance of Section 25F of the ID Act.

. In the case of *Hariprasad Shivshankar Shukla V. A.D.Divelkar and others; AIR 1957 SC 121,* the Constitution Bench of the Supreme Court considered the meaning of the term "retrenchment" as defined under Section 2(oo) of the ID Act and held as under:

> . ". "Retrenchment" as defined in

> section 2(oo) and as used in Section 25F has no wider meaning than the ordinary accepted connotation of the word. It means the discharge of surplus labour or staff by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, and it has no application where the services of all workmen have been terminated by the employer on a real and bona fide closure of business or on the business or undertaking being taken over by another employer in circumstances like those of railway company which is purchased and taken over by the Government under the terms of the contract which the company constructed the railway and operated it."

. This judgment resulted in incorporation of Section 25FF and Section 25FFF in the Scheme of the ID Act.

. In the case of S.M.Nilajkar and others (supra) in para 12, Their Lordships have observed asunder"

. "12. "Retrenchment" in its ordinary connotation is discharge of labour as surplus though the business or work itself is continued. It is well settled by a catena of decisions that labour laws being beneficial pieces of legislation are to be interpreted in favour of the beneficiaries in case of doubt or where it is possible to take two views of a provisions. It is also well settled that Parliament has employed the expression "the termination by the employer of the service of a workman for any reason whatsoever" while defining the term "retrenchment", which is suggestive of the legislative intent to assign the term "retrenchment" a meaning wider

> than what it is understood to have in common parlance. There are four exceptions carved out of the artificially extended meaning of the term "retrenchment" and therefore, termination of service of a workman so long as it is attributable to the act of the employer would fall within the meaning of "retrenchment" dehors the reason for termination. To be excepted from within the meaning of "retrenchment" the termination of service must fall within one of the four excepted categories. A termination of service which does not fall within categories (a),(b), (bb) and (c) would fall within the meaning of "retrenchment"
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> **[EMPHASIS SUPPLIED]**

. A similar situation had also come up for consideration before me in the case of *State of Maharashtra Vs.Dnyaneshwar Rakmaji Aher and another 1998 (2) Mh.L.J. 135*, and it was held, inter alia, that when the allegation of retrenchment and illegal retrenchment of service was refuted by the employer, the Tribunal is necessarily required to frame the first issue whether the employer had terminated or caused the termination of service either in writing or orally of the employee or the claimant. Unless the discontinuation in employment is proved to be at the instance of or by the action of the employer, it would not amount to termination of service by the employer. The Tribunal had proceeded to consider the issue of illegal retrenchment on the basis of allegations made by the claimant and without

examining whether infact, there was termination or discontinuation of employment at the instance of the employer or any of its officers and unless such an issue was decided, alleged action of retrenchment could not be gone into.

9. In the instant case, the evidence of the employer which went without challenge in the cross examination and through the affidavit of Mr.Nileshkumar Verma, is required to be considered. The said witness stated thus:

> . "However, as soon as project was completed, Party No.2 voluntarily left the work, at that time, near about eight casual mazdoors were working with him belonged to that area, were absorbed in other Department of Telecom Wing at Ichalkaranji such as Coaxial Maintenance, Auto Exchange, Installation works etc. I state that Party No.2 was not inclined to stay at Ichalkaranji and take up the works in other Department of Telecommunication Wings. He voluntarily went to his native place as per his plan and hence, the question of giving oral or written termination notice did not arise".

. On the absorption of the three named persons, this witness stated that "Mr.H.B.Kulkarni was suddenly asked to take up Aurangabad-Dhulia Coaxial Scheme during 1987-88, a few local ardours were given work at Aurangabad to meet the exigencies of work." The witness further stated regarding the present

respondent as under:

> . "I state that Party No.2 approached Party No.1 for getting the work at Belgaum only which he could not do. This is borne by the fact that he never volunteered for any work out side Belgaum from 1985 to 1992 either orally or in writing probably he has been unsuccessful in gaining other employment and when Party No.2 came to know that casual mazdoors employed before 1985 were being made permanent, their wages were better in comparison to what they were getting earlier, as an after thought, Party No.2 started asking Party No.1 to give him work and absorb him."

. The witness admitted in his cross examination that when the respondent approached Mr.Kulkarni for reemployment for the first time, the same could not be done in view of surplus of labour and he reiterated that the workman left on his own when the work that he was doing, had finished.

10. So far as the evidence of the respondent-workman is concerned, admittedly for the first time, he made a representation dated 24.9.1990 followed by another representation dated 27.7.1991 and alleged illegal termination of service. His statement that in between he had orally approached the Officers for reemployment and the same was denied, has no reliable

support. His brother in law is employed under the petitioner and it was possible for him to put up written applications through the same officers any time from 1.4.1985 till the end of October 1990. It is evident that even after the name of three persons who were allegedly absorbed from 1.4.1985 to 13.2.1988, the respondent-workman did not take any steps to submit a written representation seeking the same benefits. Under such circumstances, there may be a case of belated or stale claim.

11. In the case of S.M.Nilajkar and others (supra), the Division Bench of Karnataka High Court had held that the workman had approached after a lapse of 7-9 years and therefore, the claim was belated. The Supreme Court did not agree with this finding by noting that the said finding was factually incorrect. The employment of the appellants therein was terminated sometimes in 1985-86 or 1986-87 and pursuant to the judgment in *Daily Rated Casual Labours Vs. Union of India (1988 (1) SCC 122),* the department had formulated the scheme to accommodate the casual workers and the appellants were justified in awaiting the outcome thereof and on 10.1.1990, they were refused to be accommodated in the scheme. On 28.12.1990, they initiated proceedings under the ID Act followed by conciliation proceedings. The

facts in this case cannot be compared with the facts in the case of S.M.Nilajkar on the point of delay. At the first place, right from 1.4.1985 till the first representation dated 24.9.1990, the workman did not submit any representation either claiming reemployment or reinstatement or alleging that he was illegally removed from service. Even from the time, he approached the Assistant Labour Commissioner and he sent the reminder dated 27.7.1991 there is nothing on record to show that he had submitted a written representation to the department. It is not known whether in these representations, he had claimed absorption on the basis of the Scheme formulated by the department for absorption of daily rated casual labours. In the case of *Shalimar Works Ltd. Vs. Workmen; AIR 1959 SC 1217,* there was a delay of four years in raising the dispute. Even after reemployment of the most of the workmen and it was held to be fatal, the Supreme Court held that merely because the Industrial Disputes Act, does not provide for limitation for raising a dispute, it did not mean that the dispute could be raised at any time and without regard to the delay and reasons therefor. In the case of *Nedungadi Bank Ltd. Vs. K.P.Madhavankutty; 2000 (2) SCC 455,* the delay of seven years was held to be fatal and the workman was held to be disentitled to any relief.

. In the case of Dnyaneshwar Aher (supra), there was a delay of five years and it was held that the workman had raised a stale claim for reinstatement.

12. On both these issues, it was necessary for the Tribunal to record a finding after framing them, and the Tribunal has failed to do so. It would be, therefore, appropriate that the parties are given opportunity to place on record such evidence as they may place before the Tribunal in support or in opposition on both the issues or either of them. As the Tribunal did not frame these issues, obviously, the parties could not lead the evidence. It is therefore, necessary to remand the reference for fresh adjudication. While doing so, it is also necessary to refer to a recent judgment of the Supreme Court in the case of *Mahendra L.Jain and others Vs. Indore Development Authority and others reported in (2005) 1 SCC 639* that the casual mazdoor or daily wager does not hold the claim for regular employment where such employment is covered by the Rules prescribed and if such casual workman is held to have been illegally retrenched, his reinstatement is in a casual post and on the same remuneration, as he was drawing at the time of the alleged retrenchment. At the same time, the employer is at liberty to comply with the provisions of Section 25F and pass fresh order so long as the employer is not

covered by the provision of Section 25-O of the ID Act. Such employees do not get a claim for regularisation in service. The petitioner took a specific plea before the Tribunal that the project at Ichalkaranji in which the respondent was employed, was over on 31.3.1985 and the three persons named were absorbed under new projects taken up at Aurangabad and other places. Awaiting the decision in the reference on remand, the petitioner will have to consider the appointment of the respondent-employee against the vacancy available under any project in the State of Maharashtra and Goa.

13. For the reasons stated hereinabove, the impugned award cannot be sustained as it suffers from errors apparent on the face of the record. Hence, the petition succeeds and the impugned award is hereby quashed and set aside. Reference (CGIT) No. 4/1994 is remanded for fresh adjudication by framing the two above referred additional issues and by giving opportunities to both the parties to lead evidence on the same. On the remand, the reference shall be heard and decided as expeditiously as possible and preferably within a period of six months from the receipt of writ from this Court. In the meanwhile, the petitioner may consider reemployment of the respondent-workman against an available vacancy in

any project in the State of Maharashtra and Goa as a casual mazdoor.

14. Rule made absolute accordingly with no order as to costs. Writ to go forthwith to the Tribunal, along with Record and Proceedings.

[B.H.MARLAPALLE,J.]